



Military Personnel and Freedom of Religious Expression: Selected Legal Issues

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Summary

The First Amendment of the U.S. Constitution provides the freedom to individuals to exercise their religious beliefs without governmental interference, and simultaneously prohibits government actions that benefit followers of one faith over another. At times, when government actions would otherwise burden individuals' religious exercise, the government makes efforts to accommodate the religious practice. However, accommodation of religion to prevent violations of the Free Exercise Clause must be carefully considered in order to prevent violation of the Establishment Clause.

The tension between the clauses has been illustrated in a number of military scenarios in recent years. For example, the U.S. Army recently allowed the first Sikh in more than 25 years to graduate from the officer basic training program without sacrificing the articles of his faith, allowing the officer to maintain his unshorn hair and beard and to wear a turban. In another example, announcements that the Obama Administration is reviewing the military's current "don't ask, don't tell" policy regarding homosexual servicemembers have raised several questions about the impact a new policy would have on chaplains whose religious background does not support homosexuality.

This report provides an overview of the requirements of the First Amendment related to military personnel's religious exercise. It analyzes current constitutional and statutory requirements regarding religious exercise, and provides a framework for how Congress and the courts might consider future issues that arise related to servicemembers' religious exercise. Specifically, the report examines the limitations placed on servicemembers in uniform in the exercise of their religious beliefs. It also examines the role of military chaplains and the legal challenges associated with publicly funding religious personnel. The report analyzes efforts by Congress and the Department of Defense to address the constitutional concerns that are raised by these issues.

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Introduction

The First Amendment of the U.S. Constitution provides the freedom to individuals to exercise their religious beliefs without governmental interference, and simultaneously prohibits government actions that benefit followers of one faith over another. At times, when government actions would otherwise burden individuals' religious exercise, the government makes efforts to accommodate the religious practice. However, accommodation of religion to prevent violations of the Free Exercise Clause must be carefully considered in order to prevent violation of the Establishment Clause. One of the premier examples of the tension between the religion clauses is accommodation of the religious exercise of military personnel, particularly in the limitations on personnel in uniform and the provision of military chaplains.

The tension between the clauses has been illustrated in a number of military scenarios in recent years. For example, the U.S. Army recently allowed the first Sikh in more than 25 years to graduate from the officer basic training program without sacrificing the articles of his faith. The Army granted an exemption from the uniform policy, allowing the officer to maintain his unshorn hair and beard and to wear a turban as required by his faith.¹ Some argue that allowing exemptions to the uniform policy diminishes esprit de corps and may weaken military effectiveness. Others assert that the exemptions allow for more individuals to serve in the military at a time when the forces have been stretched thin with the ongoing conflicts. They assert that it furthers an important public policy goal of ensuring that servicemembers of all faiths are an integral part of American military life and affirms the military's role as an assimilative national institution which has historically served to counter prejudice.

In another example, announcements that the Obama Administration is reviewing the military's current "don't ask, don't tell" policy regarding homosexual servicemembers have raised several questions about the impact a new policy would have on chaplains whose religious background does not support homosexuality. Some argue that chaplains, as religious leaders, may be protected from providing support to homosexual servicemembers as a matter of conscience, similar to protections for doctors who have religious objections to abortions. Clergy and spiritual leaders traditionally benefit from heightened protection from claims of discrimination or unequal treatment of others, but it is also important to note that the military operates under a unique set of rules in contrast to the civilian society in which doctors and clergy may be afforded heightened conscience protections.

This report provides an overview of the requirements of the First Amendment related to military personnel's religious exercise. It analyzes current constitutional and statutory requirements regarding religious exercise, and provides a framework for how Congress and the courts might consider future issues that arise related to servicemembers' religious exercise. Specifically, the report examines the limitations placed on servicemembers in uniform to exercise their religious beliefs. It also examines the role of military chaplains and the legal challenges associated with public funding for religious personnel. The report analyzes efforts by Congress and the Department of Defense to address the constitutional concerns that are raised by these issues.

¹ "1st Sikh in decades graduates Army officer school," *USA Today*, March 22, 2010, available at http://www.usatoday.com/news/religion/2010-03-22-sikh-army_N.htm.

Accommodation of Religious Practices Generally

Religious exercise is protected by a number of different laws and regulations. Primarily, the protections and limitations on religion are based upon the Establishment Clause and Free Exercise Clause of the First Amendment. In addition to the First Amendment's religion clauses, the Religious Freedom Restoration Act (RFRA) supplements the standard of review of burdens on individuals' religious exercise to provide heightened protection not offered by the constitutional standard. Furthermore, the Department of Defense (DOD) has promulgated regulations addressing religious exercise in the military.

First Amendment Religious Freedoms

The First Amendment of the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."² These clauses are known respectively as the Establishment Clause and the Free Exercise Clause. Together, the clauses counterbalance the interests of individuals to practice their religious beliefs with a prohibition on government involvement in religion. At times, situations arise in which some government action would infringe upon an individual's religious exercise, but any corrective action that the government might take would raise concerns of establishment.³

Free Exercise Protections

Historically, the Free Exercise Clause protected individual exercise under a heightened standard of review for government actions that allegedly interfered with a person's free exercise of religion.⁴ The U.S. Supreme Court reinterpreted that standard in 1990. Since then, the Court has held that the Free Exercise Clause never "relieve[s] an individual of the obligation to comply with a valid and neutral law of general applicability."⁵ Under this interpretation, the constitutional baseline of protection was lowered, meaning that laws that do not specifically target religion or do not allow for individualized assessments are not subject to heightened review under the Constitution. In doing so, the Court indicated that individuals' right to freely exercise their religion exists only to the extent that they can do so while complying with laws that do not target religious exercise and apply generally to the population.

In 1993, Congress enacted the Religious Freedom Restoration Act (RFRA), which statutorily reinstated the standard of protection of heightened scrutiny for federal government actions interfering with a person's free exercise of religion.⁶ RFRA provides that a statute or regulation of

² U.S. Const. Amend. I. For discussion of the constitutional and statutory standards of review used in relation to the free exercise clause, see CRS Report RS22833, *The Law of Church and State: General Principles and Current Interpretations*, by Cynthia Brougher.

³ *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) ("While the two Clauses express complementary values, they often exert conflicting pressures."); *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 668-69 (1970) ("The Court has struggled to find a neutral course between the two religion clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.").

⁴ See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

⁵ *Employment Div., Oregon Dep't of Human Resources v. Smith*, 494 U.S. 872, 879 (1990).

⁶ P.L. 103-141, 103d Cong., 1st Sess. (November 16, 1993); 42 U.S.C. § 2000bb *et seq.* When RFRA was originally enacted, it applied to federal, state, and local government actions, but the Supreme Court later ruled that its application (continued...)

general applicability may lawfully burden a person's exercise of religion only if it (1) furthers a compelling governmental interest and (2) uses the least restrictive means to further that interest.⁷ This standard is sometimes referred to as strict scrutiny analysis. The Supreme Court has held that in order for the government to prohibit exemptions to generally applicable laws, the government must "demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program."⁸

Establishment Clause Considerations

The constitutional understanding of the Establishment Clause is more complicated than the relatively straightforward rule for the Free Exercise Clause. The Court has used a variety of different tests to determine whether a particular government action violates the Establishment Clause. Historically, the primary test used to evaluate claims under the Establishment Clause is known as the tripartite test, often referred to as the *Lemon* test, derived from *Lemon v. Kurtzman*.⁹ Under this test, a law (1) must have a secular purpose, (2) must have a primary effect that neither advances nor inhibits religion, and (3) must not lead to excessive entanglement with religion.¹⁰ Although the *Lemon* test is the one commonly employed by the Court, it has been criticized by some Justices who have applied the test in different ways. One examination focuses on whether the government has endorsed religion. The government is prohibited "from making adherence to a religion relevant in any way to a person's standing in the political community."¹¹ Another application of the *Lemon* test focuses on neutrality as the governing principle in Establishment Clause challenges. Under this interpretation, the essential element in evaluating challenges under the *Lemon* test is whether or not the government act is neutral between religions and between religion and non-religion.¹²

In addition to the *Lemon* test, the Court has used two other tests to evaluate Establishment Clause claims. One test considers whether coercion is threatening religious freedom and forbids the government from acting in a way that may coerce support or participation in religious practices.¹³ Another test permits government acts that involve religion if the Court finds that the religious

(...continued)

to state and local governments was unconstitutional under principles of federalism. *City of Boerne v. Flores*, 521 U.S. 407 (1997).

⁷ 42 U.S.C. § 2000bb-1(b). In some instances, RFRA may be preempted by another federal law. *See* S.Rept. 103-111, at 12-13 (1993) (stating that "nothing in this act shall be construed as affecting religious accommodation under title VII of the Civil Rights Act of 1964").

⁸ *Gonzales v. O Centro Espirita Beneficente Unaio Do Vegetal*, 546 U.S. 418, 435-437 (2006).

⁹ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

¹⁰ *Id.* at 612-13. While the first two prongs of the test are self-explanatory, the Court noted that the third prong prohibited "an intimate and continuing relationship" between government and religion as a result of the law. *Id.* at 621-22.

¹¹ *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring). This application of the *Lemon* test forbids "government endorsement or disapproval of religion," noting that "endorsement sends a message to nonadherents that they are outsiders ... and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." *Id.* at 688.

¹² *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968).

¹³ This test is typically invoked in the school setting because of the impressionability of those affected by possible acts of establishment. *See Lee v. Weisman*, 505 U.S. 577 (1992); *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

element has played a part in the history of the nation, or as the Court has phrased it, has become “part of the fabric of our society.”¹⁴ The applicability of these tests often varies, and multiple tests may be applied in the same case.

Constitutionally Permissible Accommodations of Religion

In some cases, particularly those discussed later in this report, the religion clauses cannot be considered in isolation from each other. The Supreme Court has considered a long line of cases involving issues that arise where these two clauses intersect, often referred to as permissive accommodation of religion. The Court’s approach to governmental accommodations of religion has developed over the past 60 years. Accommodation cases typically ask whether a government action that facilitates an individual’s religious exercise in order to comport with the Free Exercise Clause can be considered an unconstitutional support of religion under the Establishment Clause. These situations often arise in the context of religious expression in schools, which is the subject of many of the cases that illustrate the requirements of accommodation. It is important to remember, however, that while the general principles of the analysis would remain the same, the military and schools both have unique characteristics that distinguish them from accommodations offered to society at large. The Supreme Court has indicated that the framework of analysis depends on the unique needs of the particular context in which the issue arises. In the military context, this means that the Supreme Court has recognized that military decisions are entitled to a higher level of deference so that the military may maintain order and discipline within its ranks.¹⁵

In 1948 and 1952, the Court decided two similar cases related to accommodations of religion with different outcomes, illustrating the distinction between permissible accommodations and unconstitutional accommodations. In *McCollum v. Board of Education*, the Court held that a program which allowed religious education teachers to teach in public schools on a weekly basis was unconstitutional. Four years later, in *Zorach v. Clauson*, the Court held that students could be released at their parents’ request in order to receive religious instruction outside of the public schools. The Court distinguished between the cases because of the nature of the accommodation. In *McCollum*, the religious education occurred in public school classrooms during the public school day and students who opted not to receive religious instruction did not receive any alternative instruction during that time. In *Zorach*, the religious instruction occurred without the use of public school resources and allowed non-participating students to receive other secular instruction during the released-time program.

It may be of interest to note that a concurring opinion to a later case related to religious exercise in public schools expounded on the constitutionality of the military chaplaincy.¹⁶ That concurrence noted that two factors were present in the accommodation of servicemembers’

¹⁴ *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

¹⁵ *See Rostker v. Goldberg*, 453 U.S. 57 (1981). *See also Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953) (“The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.”); *Parker v. Levy*, 417 U.S. 733, 758 (1974) (“while the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections.”); *Katcoff v. Marsh*, 755 F.2d 223, 233 (2d Cir. 1985) (“Those who want the individual liberty embodied in our Bill of Rights must be willing to make sacrifices for it. One of these is the duty of a soldier to obey military orders and forego many of the freedoms that he would otherwise enjoy as a civilian.”).

¹⁶ *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) (Brennan, J., concurring).

religious exercise that were not relevant in typical public prayer cases. First, membership in the military causes servicemembers to be isolated from their religious communities and opportunities for separate personal religious exercises for extended periods of time.¹⁷ Second, religious services offered by military chaplains are not forced upon members of the military, and those who opt not to participate are not subjected to the exercises, nor punished for non-participation.¹⁸

The Court has decided other accommodations cases arising in other contexts, including labor laws, tax laws, and zoning laws. These cases provide several significant understandings regarding permissible accommodations. The Court has held that a valid accommodation must remain neutral in its accommodation of individual religious exercise¹⁹ and that the accommodation must meet a burden that is imposed directly on religious exercise.²⁰ Overall, the Court appears generally to regard accommodations as constitutional if they balance the interests of the various parties involved in the controversy and do not benefit individuals with religious objections at the expense of individuals who are not claiming religious objections. These rules reflect the line that the Court has drawn between permissible and unconstitutional accommodations: the government may only accommodate or facilitate, not favor or promote, religious exercise.

DOD Policy

The Department of Defense has implemented a series of directives and instructions addressing various aspects of religious practices within the armed services. A DOD directive “establishes policy, delegates authority, and assigns responsibilities” with respect to a particular issue within the DOD.²¹ A DOD instruction may also establish policy and assign responsibilities, but the scope is limited to a “functional area assigned in the Head of an OSD [Office of the Secretary of Defense] Component’s chartering DoDD [Department of Defense Directive].”²² However, a DOD instruction, when issued in accordance with a previously published directive, “implements policy established in a DoDD by providing general procedures for carrying out that policy.”²³ The overarching policy, reflected in the various DOD instructions and directives discussed below, is to accommodate the free exercise of religion when it will not have an adverse impact on mission accomplishment, military readiness, unit cohesion, standards, or discipline.

DOD Instruction 1300.17—Accommodation of Religious Practices Within the Military Services

The DOD Instruction 1300.17 “[p]rescribes policy, procedures, and responsibilities for the accommodation of religious practices in the Military Services.”²⁴ The instruction states that the “U.S. Constitution proscribes Congress from enacting any law prohibiting the free exercise of

¹⁷ *Id.* at 297-98.

¹⁸ *Id.*

¹⁹ See *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985); *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987); *Board of Education of Kiryas Joel v. Grumet*, 512 U.S. 687 (1994).

²⁰ See *Texas Monthly v. Bullock*, 489 U.S. 1 (1989).

²¹ Department of Defense, *DoD Directives Program*, DOD Instruction 5025.01, Enclosure 4 (October 28, 2007).

²² *Id.*

²³ *Id.*

²⁴ Department of Defense, *Accommodation of Religious Practices Within the Military Services*, DOD Instruction 1300.17 (February 10, 2009).

religion” and indicates that the DOD “places a high value on the rights of members of the Military Services to observe the tenets of their respective religions.” Therefore, the established DOD policy is that “requests for accommodation of religious practices should be approved by commanders when accommodation will not have an adverse impact on mission accomplishment, military readiness, unit cohesion, standards, or discipline.”²⁵

Procedures accompanying the instruction establish five factors that should be considered, in accordance with rules prescribed by the Secretary of the military department concerned, when determining whether to grant a request for the accommodation of religious practices.²⁶ The factors are

1. The importance of military requirements in terms of mission accomplishment, military readiness, unit cohesion, standards, and discipline.
2. The religious importance of the accommodation to the requester.
3. The cumulative impact of repeated accommodations of a similar nature.
4. Alternative means available to meet the requested accommodation.
5. Previous treatment of the same or similar requests, including treatment of similar requests made for other than religious reasons.²⁷

The procedures address the ability of servicemembers to wear items of religious apparel while in uniform, specifically referencing the authority contained in 10 U.S.C. § 774, discussed *infra*.²⁸ Religious apparel items include “articles of clothing worn as part of the doctrinal or traditional observance of the religious faith practiced by the [servicemember].”²⁹ However, hair and grooming practices required or observed by religious groups are not included in the definition of religious apparel items.³⁰ Jewelry bearing religious inscriptions or otherwise indicating affiliation or belief are not covered by the instruction, rather the wearing of such items are subject to regulations applicable to jewelry that is not of a religious nature.³¹ The statute includes two exceptions to the general rule allowing servicemembers to wear items of religious apparel. If the item interferes with the ability of the servicemember to perform military duties or if the item is not neat and conservative, it may be prohibited. The four factors to be utilized in determining if the apparel interferes with military duties are as follows:

1. Impairs the safe and effective operation of weapons, military equipment, or machinery.
2. Poses a health or safety hazard to the servicemember wearing the religious apparel and/or others.
3. Interferes with the wear or proper function of special or protective clothing or equipment.

²⁵ *Id.* at § 4.

²⁶ *Id.* at Enclosure.

²⁷ *Id.* at Enclosure, § 1.

²⁸ *Id.* at Enclosure § 5.

²⁹ *Id.* at § 3b.

³⁰ *Id.*

³¹ *Id.*

4. Otherwise impairs the accomplishment of the military mission.³²

The “neat and conservative” exception, in the context of wearing a military uniform, is addressed by identifying acceptable items of religious nature as those that

1. are discreet, tidy, and not dissonant or showy in style, size, design, brightness, or color;
2. do not replace or interfere with the proper wear of any authorized article of the uniform; and
3. are not temporarily or permanently affixed or appended to any authorized article of the uniform.³³

It appears that application of the various factors could differ based on the parties involved in the assessment. While it may be possible that the decision whether to accommodate a religious practice would not be uniform across the military services, the underlying DOD policy is to grant the request when accommodation will not have an adverse impact on mission accomplishment, military readiness, unit cohesion, standards, or discipline.

DOD Instruction 1325.06—Handling Dissident and Protest Activities Among Members of the Armed Forces

While not specific to freedom of religion, the DOD Instruction 1325.06 establishes policy and provides procedures for handling dissident and protest activities by servicemembers.³⁴ The instruction reiterates it is DOD policy that a servicemember’s “right of expression should be preserved to the maximum extent possible in accordance with the constitutional and statutory provisions ... and consistent with good order and discipline and the national security.”³⁵ Thus, the military commander is responsible for utilizing “calm and prudent judgment” in balancing the rights of servicemembers against the need to prohibit actions that “would destroy the effectiveness of his or her unit.”³⁶

Procedures provide guidance to military commanders related to specific types of actions/activities. For example, commanders are authorized to place establishments off-limits when activities occurring there include, “counseling [servicemembers] to refuse to perform duty or desert; pose a significant adverse effect on [servicemember’s] health, morale, or welfare; or otherwise present a clear danger to the loyalty, discipline, or morale of a member or military unit.”³⁷ Additional guidance is provided with respect to on- and off-post demonstrations, specifically prohibiting participation when violence is a likely result, or when participation may present a clear danger to the loyalty, discipline, or morale of the troops.³⁸

³² *Id.* at Enclosure § 5.

³³ *Id.* at § 3a.

³⁴ Department of Defense, *Handling Dissident and Protest Activities Among Members of the Armed Forces*, DOD Instruction 1325.06, § 1.b. (November 27, 2009).

³⁵ *Id.* at § 3.b.

³⁶ *Id.* at §§ 3.c. and 3.d.

³⁷ *Id.* at Enclosure 3, § 2.

³⁸ *Id.* at Enclosure 3, § 5 & 6.

Arguably, the most relevant provision in the procedures, found in Section 8.a., addresses explicitly prohibited activities. Servicemembers “must not actively advocate supremacist doctrine, ideology, or causes, including those that advance, encourage, or advocate illegal discrimination based on race, creed, color, sex, religion, ethnicity, or national origin or that advance, encourage, or advocate the use of force, violence, or criminal activity or otherwise advance efforts to deprive individuals of their civil rights.”³⁹ While the prohibition does not explicitly prohibit the exercise of any specific religion, it may be argued that a religion advocating a supremacist doctrine, ideology, or cause, or the use of force, violence, or criminal activity would be prohibited under this instruction. The procedures stress that the “functions of command include vigilance about the existence of such activities; active use of investigative authority to include a prompt and fair complaint process; and use of administrative powers such as counseling, reprimands, orders, and performance evaluations” to deter servicemembers from participating in prohibited activities.⁴⁰ Further, military commanders are authorized to “employ the full range of administrative and disciplinary actions, including administrative separation or appropriate criminal action” against servicemembers that participate in prohibited activities.⁴¹

Restrictions on Personnel in Uniform

Goldman v. Weinberger

In 1986, the U.S. Supreme Court, in *Goldman v. Weinberger*,⁴² addressed a constitutional challenge of a regulation concerning wearing of the uniform. Captain S. Simcha Goldman, an Air Force officer, challenged an Air Force regulation prohibiting servicemembers from wearing headgear while indoors. The regulation stated that “[headgear] will not be worn ... [while] indoors except by armed security police in the performance of their duties.”⁴³ Goldman, an Orthodox Jew and ordained rabbi, argued that the regulation, as applied to him, “prohibits religiously motivated conduct” by prohibiting him from wearing a yarmulke.⁴⁴

Prior to 1981, Goldman had not been prohibited from wearing a yarmulke while on duty as a clinical psychologist. He avoided controversy when wearing his yarmulke on base by remaining close to his duty station and wearing a service cap over the yarmulke while outdoors. Only after testifying as a defense witness as part of a court-martial, at which the opposing counsel complained about the yarmulke, was Goldman ordered by his commanding officer to not violate the regulation when outside of the hospital. After Goldman’s attorney filed a complaint with the general counsel of the Air Force, the commanding officer then revised the order prohibiting Goldman from wearing the yarmulke even while in the hospital. Goldman also received a formal letter of reprimand and was warned that failure to obey the regulation could subject him to court-

³⁹ *Id.* at Enclosure 3 § 8.a.

⁴⁰ *Id.* at Enclosure 3 § 8.c.

⁴¹ *Id.*

⁴² *Goldman v. Weinberger*, 475 U.S. 503 (1986).

⁴³ AFR 35-10, para. 1-6.h(2)(f) (1980) (AFR 35-10 has subsequently been replaced by Air Force Instruction (AFI) 36-2903, which contains Table 2.9, Religious Apparel Waivers).

⁴⁴ *Goldman v. Weinberger*, 475 U.S. at 506.

martial. Additionally, a recommendation endorsing Goldman's application to extend his term of active duty service was revoked and substituted with a negative recommendation.⁴⁵

As a result of the alleged retribution, Goldman sued the Secretary of Defense and others, claiming that the application of the Air Force regulation preventing him from wearing his yarmulke "infringed on his *First Amendment* freedom to exercise his religious beliefs."⁴⁶ The United States District Court for the District of Columbia temporarily enjoined⁴⁷ enforcement of the regulation, and after a full hearing on the issue permanently enjoined the Air Force from prohibiting Goldman from wearing the yarmulke while in uniform.⁴⁸ The case was appealed to the Court of Appeals for the District of Columbia Circuit, which reversed the order of the lower court.⁴⁹ The court of appeals determined that the "appropriate level of scrutiny of a military regulation that clashes with a constitutional right is neither strict scrutiny nor rational basis," but rather the regulation "must be examined to determine whether 'legitimate military ends are sought to be achieved' and whether it is 'designed to accommodate the individual right to an appropriate degree.'"⁵⁰ The court ultimately concluded that the interest in uniformity required the strict enforcement of the regulation.⁵¹

Goldman appealed the decision of the court of appeals to the U.S. Supreme Court, arguing that the wrong standard was applied and that because the regulation prohibits religiously motivated conduct, it should be held to a higher level of scrutiny. The Court stated that in the context of the current case, "when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."⁵² The Court continued, "military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy. '[Judicial] deference ... is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.'"⁵³

The Court looked to the "considered professional judgment of the Air Force" to discern "that that traditional outfitting of personnel in standardized uniform encourages the subordination of personal preferences and identities in favor of the overall group mission."⁵⁴ The Court acknowledged that the Air Force promulgated the regulation to develop the "necessary habits of discipline and unity," but also noted that "military commanders may in their discretion permit visible religious headgear and other such apparel in designated living quarters."⁵⁵ However, Goldman asserted "that the *Free Exercise Clause of the First Amendment* requires the Air Force to make an exception to its uniform dress requirements for religious apparel unless the

⁴⁵ *Id.* at 505.

⁴⁶ *Id.* at 506.

⁴⁷ *Goldman v. Secretary of Defense*, 530 F.Supp. 12 (1981).

⁴⁸ *Goldman v. Secretary of Defense*, 29 Empl. Prac. Dec. P 32,753 (1982).

⁴⁹ *Goldman v. Secretary of Defense*, 236 U. S. App. D. C. 248, 734 F.2d 1531 (1984).

⁵⁰ *Goldman v. Weinberger*, 475 U.S. at 506 (citing *Goldman v. Secretary of Defense*, 734 F.2d at 1540).

⁵¹ *Id.* at 506.

⁵² *Id.* at 507.

⁵³ *Id.* at 508 (citing *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)).

⁵⁴ *Id.* at 508.

⁵⁵ *Id.* at 509.

accouterment create a ‘clear danger’ of undermining discipline and esprit de corps.”⁵⁶ Goldman also argued that expert testimony established that “religious exceptions to [the regulation] are in fact desirable and will increase morale by making the Air Force a more humane place.”⁵⁷ The Court was not swayed by this argument, stating that the opinion of expert witnesses “is quite beside the point” and that the appropriate military officials “are under no constitutional mandate to abandon their considered professional judgment.”⁵⁸ The Court continued, “[t]he Air Force has drawn the line essentially between religious apparel that is visible and that which is not, and we hold that those portions of the regulations challenged here reasonably and evenhandedly regulate dress in the interest of the military’s perceived need for uniformity.”⁵⁹ The Court ultimately concluded that the First Amendment did not prohibit application of the regulation to Goldman even though the effect was to restrict the wearing of the yarmulke while in uniform as required by his religious beliefs.

10 U.S.C. § 774—Religious apparel: wearing while in uniform

In 1987, shortly after the decision in *Goldman v. Weinberger*, Congress added Section 774 to Title 10 of the United States Code providing that, with limited exceptions, “a member of the armed forces may wear an item of religious apparel while wearing the uniform of the member’s armed force.”⁶⁰ The statute creates two categories of exceptions: (1) items that would interfere with the performance of the military duties; and (2) apparel that is not neat and conservative.⁶¹ Further, the statute directs the Secretary concerned with prescribing regulations in accordance with the stated exceptions.⁶² In the conference report accompanying the legislation, the conferees noted that “the Congress has been extremely sensitive to the needs of the armed forces for uniformity, safety, good order, and discipline, and has carefully balanced those needs in light of the right of service members to freedom of religion, as well as the need to avoid governmental establishment of religion.”⁶³

DOD Instruction 1334.01—Wearing of the Uniform

The wearing of uniforms by current and former members of the armed forces is controlled by DOD Instruction 1334.01. The instruction limits when and where current members of the armed forces may wear the uniform, as well as establishes policy on wearing of the uniform by former members.⁶⁴ There are five specific prohibitions applicable to current members, three of which contain a subjective element and two that are explicit prohibitions. Current members are generally prohibited from wearing the uniform: (1) “during or in connection with furthering political activities, private employment or commercial interests, when an *inference* of official sponsorship

⁵⁶ *Id.* (emphasis in original).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 510.

⁶⁰ P.L. 100-180, 101 Stat. 1086 (December 4, 1987).

⁶¹ 10 U.S.C. § 774(b).

⁶² 10 U.S.C. § 774(c).

⁶³ U.S. Congress, *National Defense Authorization Act For Fiscal Years 1988 and 1989*, Conference Report to accompany H.R. 1748, 100th Cong., 1st Sess., (1987), H. Conf. Rpt. 100-446 (Washington: GPO, 1987), p. 638.

⁶⁴ Department of Defense, *Wearing of the Uniform*, DOD Instruction 1334.01, § 1 (October 26, 2005).

for the activity or interest may be drawn”;⁶⁵ (2) “when participating in activities such as unofficial public speeches, interviews, picket lines, marches, rallies or any public demonstration, which may *imply* Service sanction of the cause”;⁶⁶ and (3) “when wearing of the uniform *may tend* to bring discredit upon the Armed Forces.”⁶⁷ Additionally, current members are explicitly prohibited from wearing the uniform when “specifically prohibited by regulations of the Department concerned.”⁶⁸ However, this prohibition may contain a subjective element depending on how the regulation has been drafted. For example, servicemembers may be authorized to wear uniforms to and from duty, but be prohibited from exiting their vehicles while driving to and from work unless it is an emergency.⁶⁹ Under a regulation of this type, determining whether something is an emergency may have a subjective or discretionary component. The last prohibition, and most explicit, prohibits current members from wearing uniforms

at any meeting or demonstration that is a function of, or sponsored by an organization, association, movement, group, or combination of persons that the Attorney General of the United States has designated, under Executive Order 10450 as amended ... as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others the rights under the Constitution of the United States, or as seeking to alter the form of Government of the United States by unconstitutional means.⁷⁰

Arguably, this instruction, much like the DOD policy with respect to dissident activities discussed above, could be applicable to a religious organization. If a religious organization were designated by the Attorney General as “totalitarian, fascist, communist, or subversive,” a servicemember would be prohibited from wearing a uniform at a meeting or demonstration of, or sponsored by, the organization. Therefore, a servicemember could ultimately violate the policy against participating in dissident activities and the uniform policy by attending a gathering while wearing the uniform.

The wearing of the uniform by former members of the armed forces is addressed by the instruction in permissive terms, rather than like the prohibitions applicable to current members. The policy is that former members, who served honorably and whose most recent service was terminated under honorable conditions, may wear the uniform while participating in two general categories: (1) military funerals, memorial services, weddings, and inaugurations; and (2) parades on national or state holidays; or other parades or ceremonies of a patriotic nature in which U.S. military units are taking part.⁷¹ In all other instances, former members of the armed forces are prohibited from wearing the uniform.⁷²

⁶⁵ *Id.* at § 3.1.2 (emphasis added).

⁶⁶ *Id.* at § 3.1.3 (emphasis added) (an exception to this prohibition exists if a servicemember receives authorization from the Chairman of the Joint Chiefs or a Commander of a Combatant Command to participate in the event).

⁶⁷ *Id.* at § 3.1.4 (emphasis added).

⁶⁸ *Id.* at § 3.1.5.

⁶⁹ For a discussion related to proposed U.S. Navy working uniforms regulations, see http://www.navytimes.com/news/2008/12/navy_uniform_faq_121508w/

⁷⁰ DOD Instruction 1334.01, § 3.1.1.

⁷¹ *Id.* at § 3.2.

⁷² *Id.* at § 3.2.3 (Medal of Honor holders, however, may wear the uniform at their pleasure except under the prohibitions applicable to current members of the armed forces. *Id.* at § 3.3).

Provision of Religious Services to Military Personnel

The military chaplaincy raises other issues of accommodation of religious practices in the military. The chaplaincy is a fairly unique institution in the context of religious freedom analysis because it is a government-funded program with the specific purpose of providing religious services to members of the U.S. military. Although courts have not invalidated the chaplaincy as a violation of religious freedoms so far, there have been indications that some specific operations of the chaplaincy may raise constitutional concerns.

Constitutionality of the Military Chaplaincy: *Katcoff v. Marsh*

In 1985, the U.S. Court of Appeals for the Second Circuit decided the only direct constitutional challenge to the military chaplaincy, *Katcoff v. Marsh*.⁷³ Although later cases have challenged how the chaplaincy is administered, *Katcoff* considered whether the mere existence of the military chaplaincy violated the Establishment Clause. The Second Circuit held that the chaplaincy did not violate the Establishment Clause, but concluded that specific practices of the chaplaincy may not be constitutional.⁷⁴

The Second Circuit noted that the Supreme Court upheld the constitutionality of legislative chaplains offering prayers at legislative sessions under the rationale that the practice was a part of American history and had been woven into the fabric of our society. The Court had reasoned that the legislative chaplaincy had an “unbroken history of more than 200 years.”⁷⁵ Arguments have been made that the legislative chaplaincy is distinct from the military chaplaincy, meaning that the Supreme Court’s analysis of the legislative chaplaincy does not control the outcome of cases challenging the military chaplaincy. Thus, the Second Circuit examined the challenge under other constitutional tests.

The court indicated that the military chaplaincy would fail under the *Lemon* test’s requirements, but recognized that the Establishment Clause concerns must be balanced by other constitutional considerations, including the Free Exercise Clause.⁷⁶ The court held that the military chaplaincy was a constitutional means of accommodating servicemembers’ religious exercise rights under the Free Exercise Clause. Because members of the military have been removed from their religious communities, the court explained that the government had interfered with their ability to exercise their religious beliefs.⁷⁷ Accordingly, the military chaplaincy, although unconstitutional if examined solely under the Establishment Clause, alleviated the burden imposed by the military on servicemembers’ religious exercise. The court reinforced this balance favoring the accommodation of servicemembers’ religious exercise by noting the importance of the interests of

⁷³ 755 F.2d 223 (2d Cir. 1985).

⁷⁴ *Id.*

⁷⁵ *Id.* at 232 (citing *Marsh v. Chambers*, 463 U.S. 783 (1983)) (internal quotations omitted).

⁷⁶ *Id.* at 232 (“If the current Army chaplaincy were viewed in isolation, there could be little doubt that it would fail to meet the *Lemon v. Kurtzman* conditions. ... However, neither the Establishment Clause nor statutes creating and maintaining the Army chaplaincy may be interpreted as if they existed in a sterile vacuum.”).

⁷⁷ *Id.* at 234.

the War Powers Clause⁷⁸ of the U.S. Constitution, which required the court to give significant deference to Congress in military affairs. The court explained that “when a matter provided for by Congress in the exercise of its war power and implemented by the Army appears reasonably relevant and necessary to furtherance of our national defense it should be treated as presumptively valid and any doubt as to its constitutionality should be resolved ... in favor of deference to the military’s exercise of discretion.”⁷⁹ Thus, the court determined that because the chaplaincy serves as an accommodation to alleviate a burden on religion imposed by the government and because the military is entitled to deference in a reasonable policy to ensure that servicemembers are adequately treated to maintain military order, the chaplaincy is a permissive accommodation of religion by the government.

Challenges to the Specific Components of the Military Chaplaincy

Although the legal debate over the constitutionality of the chaplaincy program has appeared settled since *Katcoff*, later cases address whether specific practices of the chaplaincy program in various branches of the military comport with constitutional requirements. Among the issues considered by lower courts are the employment and hiring practices for military chaplains and the role of religious pluralism in chaplains’ practices.

One of the most recent and illustrative challenges to the specific practices of the military chaplaincy was *Larsen v. U.S. Navy*, a federal district court case decided in 2007.⁸⁰ In *Larsen*, three non-liturgical Protestant ministers challenged the Navy’s hiring practices for the chaplaincy as violations of the First Amendment. The ministers alleged that the Navy’s previous and current hiring practices were inadequate to meet constitutional requirements related to religious exercise of servicemembers. The court rejected the challenge to the earlier hiring policy, which divided the chaplaincy into thirds (Roman Catholic, Protestant liturgical, and non-liturgical Christian and Special Worship), as moot.⁸¹ The court did consider the constitutionality of the Navy’s hiring practice that was in place at the time of the lawsuit, however, and ultimately held that it was a constitutionally permissible form of religious accommodation under the First Amendment.

The Navy hiring policy at issue in *Larsen* was described as faith group-neutral and designed to take “the best qualified candidates, regardless of denomination.”⁸² The policy considers several factors in determining the composition of the chaplaincy:

the breadth of locations where Navy personnel serve; the unique circumstances of Naval service, which involves personnel isolated on ships sailing all over the world; the various functions and tasks of chaplain officers outside of religious services including assistance to those of other faith groups and even no faith groups; the need to keep accession, promotion, and retention in line with other naval communities; the need to prevent shortages of qualified clergy; the need to maintain capacity to respond to events requiring quick access to chaplains

⁷⁸ U.S. CONST. art. I, § 8.

⁷⁹ *Id.* (citing *Rostker v. Goldberg*, 453 U.S. 57 (1981)).

⁸⁰ 486 F.Supp.2d 11 (D.D.C. 2007).

⁸¹ *Id.* at 24. Whether the Navy ever used the so-called Thirds Policy was a fact disputed among the parties, but the court held that the issue was moot because the policy was not in place at the time of the lawsuit and the plaintiffs did “not allege that the Navy plans to reinstate its challenged Thirds Policy.” *Id.*

⁸² *Id.* at 24-25 (internal quotations omitted).

from different faith groups not stationed on site, such as terror attacks; and the need to consider administrative necessities in managing an all-volunteer corps.⁸³

In considering the constitutional claims related to this policy, the district court noted that typically First Amendment analysis does not defer to the government's rationale, but also noted that the Supreme Court has indicated that the military is separate from civilian society and that military actions are to receive higher deference than similar issues arising in a civilian context.⁸⁴ Notably, one Supreme Court opinion recognized that certain actions in the military context may appear to be constitutionally suspect, but a military policy that favors the group's mission over personal practices is "paramount."⁸⁵

The district court in *Larsen* framed its decision as one which fit in the so-called "joints" of the religion clauses, "in the space between the constitutional command against practices respecting an establishment of religion and the command against practices which prohibit the free exercise thereof."⁸⁶ The plaintiffs' assertions also recognized the need to accommodate the religious exercise of servicemembers, but based their challenge on the manner in which that accommodation should be offered. The court disagreed with the plaintiffs' claim that, because the military had a compelling interest in accommodating servicemembers' religious exercise, the military therefore was required to accommodate.⁸⁷ Rather, it interpreted the challenge as one that could be resolved constitutionally through permissive accommodation instead of mandatory accommodation. As such, the court rejected the claim that the chaplaincy must be narrowly tailored to specifically provide for all servicemembers' religious needs.

Applying the *Goldman* standard for deference to military decisions, the *Larsen* court held that the Navy's policy for hiring was "constitutionally sound" because it served legitimate military ends by advancing the Navy's mission of national defense and because it accommodated individual religious exercise to "an appropriate degree."⁸⁸ In reaching its conclusion, it considered the Navy's claim that "it would be impossible in any given military unit or community to provide a chaplain for each faith group represented by its members" and agreed that a "relaxed hiring approach, which ignores faith group identifiers, seems reasonable and justified."⁸⁹

Under one suggested alternative hiring policy, the chaplaincy would be directly related to the religious demographics of the Navy. The *Larsen* court found this alternative to be "flawed because it confuses religious demographics with religious need."⁹⁰ Such a plan would mean that the Navy (or another military branch) would have to spend a significant portion of resources monitoring the appropriate representation and distribution of chaplains for its servicemembers stationed around the world. Among the problems the court recognized were the difficulty in addressing "the complexities and variations of religious worship among religions generally and between individual parishioners specifically" and the assumption that chaplains of one

⁸³ *Id.* at 25-26 (internal quotations omitted).

⁸⁴ *Id.* at 26 (citing *Parker v. Levy*, 417 U.S. 733 (1974) and *Goldman v. Weinberger*, 475 U.S. 503 (1986)).

⁸⁵ See *Goldman*, 475 U.S. at 511 (Stevens, J., concurring).

⁸⁶ *Id.* at 30.

⁸⁷ *Id.* at 31.

⁸⁸ *Id.* at 33-34 (internal quotations omitted).

⁸⁹ *Id.* at 34 (internal quotations omitted).

⁹⁰ *Id.* at 35.

denomination could not serve the religious needs of servicemembers of other denominations.⁹¹ In upholding the Navy's policy to use chaplains without a strict quota system or proportional representation, the court indicated further adherence to the constitutional principle that religious accommodations are permissible if they broadly facilitate opportunities to alleviate burdens imposed upon individual religious exercise.

Other cases have addressed the specific policies of the chaplaincy as well, but very few have resulted in decisions on the merits. Often, these cases have been resolved on procedural grounds (e.g., the plaintiff lacked standing or the defendant was not a state actor). One controversial issue which remains open for judicial interpretation is whether military chaplains can be required to endorse pluralism in their practice. Chaplains are required to hold worship services, but the military does not dictate the content of such services.⁹² This allows chaplains to follow their own religious backgrounds and allows the military to avoid dictating religious policy, both consistent with the First Amendment. However, a tension arises because the chaplaincy requires that religious services take a pluralistic approach to some extent, so that any servicemember may be assisted by an available chaplain, regardless of denomination. A 2006 federal appellate decision resolved a challenge to this issue on procedural grounds, but the question remains an important issue in the debate over religious freedom in the military.⁹³

DOD Policy

It is DOD policy, established in the DOD Directive 1304.19, that the chaplaincies of each military department exist for three purposes: (1) to "advise and assist commanders in the discharge of their responsibilities to provide for the free exercise of religion in the context of military service as guaranteed by the Constitution"; (2) to "assist commanders in managing Religious Affairs"; and (3) to "serve as the principal advisors to commanders for all issues regarding the impact of religion on military operations."⁹⁴ Further, it is the DOD policy that the chaplaincies shall serve a "religiously diverse population" and that religious ministry professionals cooperate in providing "comprehensive religious support to all authorized individuals" within the military commands.⁹⁵

In support of the policy, DOD Instruction 1304.28 provides guidance for the appointment of chaplains for the military departments.⁹⁶ The instruction requires that the Secretaries of the military departments ensure that individuals appointed as chaplains meet the prescribed "minimum professional and educational qualifications."⁹⁷ Prior to being considered for an appointment to serve as a chaplain, a religious ministry professional must provide an endorsement from a qualified religious organization verifying, among many things, that the individual "is willing to function in a pluralistic environment ... and is willing to support directly and indirectly the free exercise of religion by all members of the Military Services, their family members, and

⁹¹ *Id.* at 35-36.

⁹² See 10 U.S.C. § 3547(a); 10 U.S.C. § 6031(a); 10 U.S.C. § 8547(a).

⁹³ See *Veitch v. England*, 471 F.3d 124 (D.C. Cir. 2006).

⁹⁴ Department of Defense, *Appointment of Chaplains for the Military Departments*, DOD Directive 1304.19, § 4.1 (June 11, 2004).

⁹⁵ *Id.* at § 4.2.

⁹⁶ Department of Defense, *Guidance for the Appointment of Chaplains for the Military Departments*, DOD Instruction 1304.28 (June 11, 2004).

⁹⁷ *Id.* at § 5.2.

other persons authorized to be served by the military chaplaincies.”⁹⁸ Further, applicants for appointment as chaplains must affirm that they will “abide by applicable laws, and all applicable regulations, directives, and instructions of the Department of Defense, and of the Military Department that grades the appointment.”⁹⁹

Of particular note, in 2007, the DOD implemented a change to the instruction concerning the potential nexus between religion and terrorism.¹⁰⁰ Any individual or religious organization may be removed from or rejected from participating in the chaplain program if “the individual is under indictment or has been convicted of a terrorism related offense, or other offense threatening national or economic security”; or “the religious organization appears on the annual State Department list of Foreign Terror Organizations.”¹⁰¹ The instruction provides procedures for the removal of chaplains from the service for loss of ecclesiastical endorsement;¹⁰² however, the instruction does not state if those procedures, rather than the standard administrative separation procedures, would apply to an individual removed from the chaplaincy due to indictment or conviction of terrorism related offense.

The Armed Forces Chaplains Board, established by the DOD Instruction 5120.08, serves the purpose of making recommendations on “religious, ethical, and moral matters” for the military services to the Secretary of Defense.¹⁰³ The Board consists of the Chief and active Deputy Chief of Chaplains from each of the three military departments: Army, Navy, and Air Force.¹⁰⁴ In addition to making recommendations on the “[p]rocurement, professional standards, requirements, training, and assignment of military chaplains,” the Board advises the Secretary of Defense on the “[p]rotection of the free exercise of religion according to Amendment I to the Constitution of the United States.”¹⁰⁵

⁹⁸ *Id.* at § 6.1.2.

⁹⁹ *Id.* at § 6.4.2.

¹⁰⁰ Our research did not reveal a specific justification for the change in policy. However, in September of 2003, a Muslim military chaplain was arrested and accused of espionage while ministering to Islamic inmates at Guantanamo Bay. Shortly after the arrest, on October 14, 2003, the Senate Committee on the Judiciary, Subcommittee on Terrorism, Technology and Homeland Security held a hearing titled “Terrorism: Radical Islamic Influence of Chaplaincy of the U.S. Military and Prisons.” Questions were raised during the hearing regarding the DOD’s policy on qualifications and recognition of chaplains for the military services. Ultimately, the chaplain was never court-martialed for the alleged offenses and he subsequently resigned his commission in the U.S. Army. (See “Convictions Dropped for Muslim Chaplain at Guantánamo Bay,” *The New York Times*, April 14, 2004, available at <http://www.nytimes.com/2004/04/15/national/15MUSL.html?pagewanted=1>). This series of events may have lead to the change in the DOD policy requiring the separation of chaplains indicted on terrorism related charges.

¹⁰¹ *Id.* at § 6.8.

¹⁰² *Id.* at § 6.5.

¹⁰³ Department of Defense, *Armed Forces Chaplains Board*, DOD Instruction 5120.08, § 3 (August 20, 2007).

¹⁰⁴ *Id.* at § 5.1.1. (the United States Marine Corps is a component of the Department of the Navy, and as such, is represented on the Armed Forces Chaplains Board by the Department of the Navy designee).

¹⁰⁵ *Id.* at § 5.1.2.

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